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EXAMINER

CASTELLANO, STEPHEN J

ART UNIT	PAPER NUMBER
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3727

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/617036
Filing Date: July 11, 2003
Appellant(s): BEN-AMI ET AL.

MAILED
MAY 12 2006
GROUP 3700

Mark M. Friedman
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed April 3, 2006.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

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(8) Evidence Relied Upon

The following is a listing of the evidence (e.g., patents, publications, Official Notice, and admitted prior art) relied upon in the rejection of claims under appeal.

Patents:

5,718,352	Diekhoff et al.	02-1998
5,071,042	Esposito	12-1991
4,741,936	Nohara et al.	05-1988

Official notice/ admitted prior art:

Official notice has been taken that ring pull closures of non-resealable type are well known for use on bottles and metal cans. These statements of Official notice have not been challenged by appellant and therefore, it is believed that these statements have the effect of being admitted prior art.

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1, 7-9 and 25 are rejected under 35 U.S.C. 102(b) as being anticipated by Nohara et al. (Nohara).

Nohara discloses an unstable receptacle (bottle) for storing and dispensing a carbonated beverage, a lid is placed on the neck finish of the bottle to seal the beverage within the bottle. The container has a hemispherical shaped base. The height of the container appears to be high enough that the center of gravity is above the center of curvature of the hemispherical base. This

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same condition appears in the present invention. Therefore, whether the bottle is empty or filled or partially filled, the bottle will not stand upright upon the hemispherical shaped base and if placed on its base the bottle would tip over and rest upon its cylindrical side wall. This defines an unstable receptacle that has a manner of instability identical to that of the present invention. When the container is placed in any orientation upon a level surface and after the container tips over, a majority of the liquid therein spills out of the entirely filled container due to the orientation of the opening of the bottle being axially centered in alignment with a central longitudinal axis. Note that claim 1 is meant to include the bottle embodiments as in claim 5 and Fig. 1, 2 and 5-7. Nohara is deemed to have a structure that would allow spillage in a similar manner as the bottles of the present invention. Since the majority of the liquid spills out, this meets the "at least one-third of the volume" limitation in the claims.

Claims 2, 4, 6 and 20-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Nohara in view of Esposito and Diekhoff et al. (Diekhoff).

Nohara discloses the invention except for the non-resealable seal and the receptacle being a metal can. Nohara includes a teaching in the background section of covering a polyester bottle with an aluminum foil to provide a gas barrier (see col. 1, lines 64-68). Esposito teaches a metal can with a non-resealable pull tab closure that is adapted to become a bottle by attaching a bottle spout. The bottle spout is removable for adapting the bottle to become a metal can. Diekhoff teaches a metal can with the shape of a bottle. It would have been obvious to modify the shape of the bottle to be the shape of a metal can as taught by Esposito's use of an adapter to convert between a bottle when the adaptor is placed on the can. It would have been obvious to call a bottle shaped receptacle a can as taught by Diekhoff. It would have been obvious to modify the

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material of a laminated polyester bottle to be metal as taught by Esposito and Diekhoff as a stronger and durable material and as a better gas barrier as taught at column 1, lines 64-69 of Nohara.

Re the non-resealable seal, Official notice is taken of well known ring pull closures for bottles. This Official notice has gone unchallenged and is now considered admitted prior art. It would have been obvious to modify the closure to be a non-resealable ring pull closure in order to provide easy opening of the bottle as the ring pull provides a defined area for finger gripping.

Claims 1, 2, 4, 6-9, 20-23 and 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Esposito in view of Nohara.

Esposito discloses a metal can with a stable bottom. Esposito discloses the invention except for the unstable rounded bottom and a ring-pull closure. Nohara teaches an unstable hemispherical shaped bottom. It would have been obvious to modify the bottom to be a rounded downwardly projecting hemisphere in order to increase the volume of the receptacle over a flat, non-downwardly extending bottom and an inwardly and upwardly extending concave bottom. Applicant admits that ring-pull closures are known for beverage cans in the statement made at page 1, lines 8-10 of the specification. Furthermore, applicant did not seasonably challenge the Official notice taken in the last Office action and therefore admits that ring pull closures are well known.

(10) Response to Argument

102 Rejection – Nohara

Appellant states that the examiner has assumed a mode of use of the bottle of Fig. 8 in which the round bottomed bottle is taken, as is, without further modification (see appellant's remarks at the first paragraph of page 7 of the brief filed April 3, 2006). In response, the examiner has only to look at the evidence of record to see that there is no indication of use of a stand or other stabilizing feature. Nohara is silent to the rounded bottom having a stabilizing feature added. The evidence cited by applicant, including other patents and a declaration do not prove that Nohara is only used with a stabilizing feature. Therefore, the examiner is forced to conclude that no stabilizing feature is present within Nohara and Nohara fully anticipates the present invention.

Appellant further states that the examiner appears oblivious to the common practice of using a stabilizing base element on bottles. The examiner can remember that this was once standard practice. However, the evidence of record doesn't indicate that Nohara is to be exclusively used with a stabilizing base.

Appellant has submitted the expert witness testimony of Mr. Gideon Feiner, CEO of Polymer Logistics, in a declaration submitted February 1, 2006. Mr. Feiner refers to a widely practiced manufacturing technique of gluing on a "base cup" to stabilize a round bottle. Mr. Feiner acknowledges that Nohara does not refer to a stabilizing base. Mr. Feiner states that "it is self evident to one ordinarily skilled in the art that the bottle described by Nohara was to be used with such base." Unfortunately, it is unclear how Mr. Feiner could be certain that Nohara was to be used with such a base. There is no evidence that Mr. Feiner had previous knowledge of Nohara before the present application was submitted. It is not known whether Mr. Feiner had

knowledge of every patent owner or licensee of Nohara and whether their actual manufacturing practices were aligned with the widely practiced base cup stabilization or if their actual practices deviated from use of a base cup or any other stabilizing feature.

Mr. Feiner was marketing director for General Electric Plastics Europe and worked with equipment processors like Arburg and Sandretto. Nohara is assigned to a Japanese company, Toyo Seikan Kaisha, Ltd., Tokyo, Japan. There is no evidence that Mr. Feiner had any knowledge of manufacturing practices at Toyo Seikan or had any knowledge of the Japanese or Asian market. It is not known what Mr. Feiner knew about the manufacturing practices outside of Europe. It could be extremely likely that the Nohara bottle was never intended to be used with any stabilizing feature and was marketed exclusively for the Japanese market or other Asian markets. For these reasons, the declaration lacks sufficient evidence to prove that the Nohara bottle was always used with a stabilizing feature.

Appellant states that the explicit teachings of Nohara don't include the closure at lines 15 and 16 of page 8 of the brief filed April 3, 2006. The examiner believes the teaching of the closure to be inherent at the least because col. 7, lines 59-63 of Nohara disclose "lid-fitting, screw and anchoring portions such as screw 28," at the open end of the bottle. The screw threads 28 are shown in drawing figures 5-8.

103 Rejection – Nohara in view of Esposito and Diekhoff

Re claims 2, 4 and 20-23, appellant mentions that the ring pull of Esposito is chosen for synergy. The actual rejection of claims 2 and 4 doesn't use the ring pull closure of Esposito. The initial rejection takes Official Notice that ring pull closures are known for both bottles and

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cans. The Official notice has changed to admitted prior art since the Official notice has gone unchallenged. The motivation for modification to a ring pull closure is to provide easy opening of the bottle or can as the ring pull provides a defined area for finger gripping.

Re claims 6 and 20-23, appellant states that the modification to metal is contrary to the explicit teachings of Nohara. Esposito and Diekhoff teach that the metal material is known. Nohara includes a teaching of aluminum foil coating to provide a gas barrier. The teachings has a whole lead one of ordinary skill in the art to conclude that a metal can would have excellent gas barrier properties. The metal can would have the added benefit of being stronger and more durable than a plastic bottle.

103 Rejection – Esposito in view of Nohara

Appellant states that there is no showing of motivation to modify Esposito according to any supposed unstable-bottle teaching of Nohara. The motivation to modify the bottom to be hemispherical is stated to provide a larger volume not to provide an unstable bottom. The unstable bottle would be an effect of providing a rounded hemispherical bottom.

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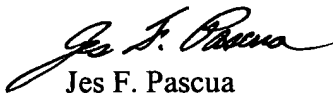
For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,


Stephen Castellano

Conferees:


Nathan J Newhouse


Jes F. Pascua